IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

Nos. 73-362 and 73-364

ROGERS C. B. MORTON, Secretary of the Interior, *et al.*,

Appellants,

and

AMERIND,

Intervenor-Appellant,

v.

C.R. MANCARI, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

BRIEF FOR THE APPELLEES

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STATEMENT OF THE CASE

Appellees take exception to the Statement of the Case by Intervenor Appellant AMERIND in the following respects:

First, the Bureau of Indian Affairs does not govern the lives of one class of peoples, namely, the Indian American.[1] The Bureau of Indian Affairs is one of many federal agencies rendering services to Indians.[2]

Second, the Bureau of Indian Affairs performs the dual role of trustee for Indian property, and serves as one of many channels through which services from both federal and state governments are rendered to Indian people. The Indian tribes, under the Indian Reorganization Act of 1934, are local self-governing entities. The thrust of the federal program in recent years has been to encourage greater Indian self determination through grants and contracts through which the Indian tribes render services formerly rendered by the Bureau of Indian Affairs, or other government agencies.[3]

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[1] Intervenor Appellant's Brief, p.4.

[2] In 1974 the President of the United States requested 1.45 billion dollars to support economic and sound development of American Indians on reservations and Alaska natives, of which $544,249,000.00 was requested for the Bureau of Indian Affairs. Budget of the U.S., Jan 29, 1973.

[3] Highlights of the Department of the Interior Bureau of Indian Affairs Budget, February 1974.

> The Bureau's budget request for fiscal year 1975 is presented in a new appropriation structure which more clearly and adequately describes the activities and functions of the Bureau and its organizational structure. In keeping with this Administration's key policy which allows concerned Indians to assume the control and operation of Federally funded and administered programs, the new proposed structure includes a line item as a subactivity in the operation of the Indian Program appropriation entitled "Direct Indian Operations" for all programs with the exception of Trust Responsibilities and Services–Indian Natural Resource Rights Protection and Real Estate and Financial Trust Services. There will remain implicit in this assumption of operations policy the fact that the Indian tribes, organizations, or individuals will make the

Third, AMERIND'S Statement of the Case ignores the thrust of the Indian Reorganization Act to strengthen Indian self government and to shift control of Indian affairs from the federal bureaucracy to the self governing tribes.[4]

ARGUMENT

I.

THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972 REPEALED, BY IMPLICATION, THE ACTS OF CONGRESS GIVING INDIANS PREFERENCE IN EMPLOYMENT IN THE BUREAU OF INDIAN AFFAIRS OF THE DEPARTMENT OF THE INTERIOR.

Appellees Mancari, *et al,* realize that Indians are unique persons with a different history. Appellees do not question the right of Congress to deal with Indians in an extraordinary manner. Congressional power in this area is plenary.

However, none of the appellants in this matter deny that Indian employees in the Bureau of Indian Affairs are federal employees nor do they deny that the Equal

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determination of *what* they wish to assume and *when* they will do so. Also, as in the past, the right to return control and operation of programs to the Bureau is available at all times and in all instances. Bureau officials will act as brokers and never as salesmen. (Emphasis is ours).

[4] Indian Reorganization Act of 1934, 25 USCA 12, Sec. 461, through 479.

Employment Opportunity Act of 1972 applied to all non exempted federal employers and their employees.[5]

In the Civil Rights Act of 1964, an exemption was made for Indians living *on or near a reservation.* Section 703 (i), 42 USC §2000e-2(i) (Emphasis ours). In fact, the exemption is granted only to any business or enterprise operating on or near a reservation with a publicly announced employment practice of assisting Indians. Congress could grant such an exception here because these businesses are not under Fifth Amendment Restrictions.

Such an exemption or restriction is conspicuously absent from the 1972 Equal Employment Opportunity Act and for good reason.

First, as a matter of congressional record, Senator Byrd of West Virginia and Senator Humphrey of Minnesota speaking for the 1972 Act made the following remarks:

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[5] Section 717 provides in part as follows:

"Sec. 717. (a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in Section 102 of Title 5, United States Code, in executive agencies (other than the General Accounting Office) as defined in Section 105 of Title 5, United States Code (including employees and applicants for employment who are paid from non-appropriated funds) in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex or national origin."

Senator Byrd:

> "I do not favor special treatment or special consideration or favored employment of any individual on the basis of that person's being Black or White, male or female . . . Notwithstanding what I have just said, the fact remains that discrimination in employment, on the basis of race, does exist, and discrimination against sex does persist. Wherever there is such discrimination in employment, it is violative of the Constitution of the United States . . .
>
> "In other words, he should rise or fall on the basis of merit, not on the basis of race or religion or sex. Every qualified individual . . .Black, White or else–should be given an equal chance–not preferential treatment–at employment."

(Congressional Record, January 26, 1972 at §590).

Senator Humphrey:

> "We must make absolutely clear the obligation of the Federal Government to make all personnel actions free from discrimination based on race, color, sex, religion or national origin."

(Congressional Record, January 20, 1972, at §172-173).

Second: The fact that Section 105 of Title 5 of the United States Code specifically lists Executive department, which includes the Department of the Interior and is referred to and included in Section 717 of the 1972 Act strongly indicates that Congress did not intend to exclude that which they specifically included by reference.[6]

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[6]Title 5 §105 *Executive Agency*

For the purpose of this title, "Executive Agency" means an Executive department, a Government corporation, and an independent establishment. Pub.L. 89-554, Sept. 6, 1966, 80 Stat.379.

The major portion of Appellant Morton's argument on this First Point is an argument that the Congress should not have repealed the Indian Preference Act of 1934. The issue here is whether or not Congress did, in fact, repeal the Preference Acts by passage of the 1972 Equal Employment Opportunity Act.

The additional argument on this point made by all Appellants is the argument that in the absence of contrary legislative intent, general legislation does not repeal earlier special legislation.

In answer to this contention, Appellees point out above that the intent of Congress in this case seems clearly to be to repeal the Preference Acts. Furthermore, as pointed out by the Court below, (Appellants Jurisdictional Statement, Appendix A, P.22)

> This is not a simple instance of a relationship of a general statute to a special subject which often occurs. Each statute purports to cover the same particular subject of personnel actions relating to, as Section 717 described them, " . . . discrimination based on race, color, religion, sex or national origin." One Act applies to all but some excepted bureaus or agencies and the other to the "Indian Office". This is not a sufficient difference in the scope to bring into consideration the doctrine relating to conflicts between special and general statutes. Further by the nature of the subject matter and scope, the two cannot exist side by side. See *Posadas v. National City Bank*, 296 U.S. 497.

When Appellants argue that the 1972 Equal Employment Opportunity Act is a general statute and the Indian Preference Statutes are specific legislation and that therefore the latter should be upheld in resolving conflicts, they are merely characterizing these pieces of legislation and such characterizations are self serving and simply state conclusions. It is far more realistic to view the 1972

Act and Indian Preference and Congressional actions of equal import. In resolving the obvious conflict between the two, this Court should favor the interpretation which would be most in line with this Nation's recent wealth of Civil Rights Legislation. An interpretation that the Civil Rights Act of 1972 is the law of the land and impliedly repealed the Indian Preference Statutes is much more consistent with the trend of Civil Rights and Equal Employment Opportunity cases decided by our Federal Courts in the preceeding twenty (20) years.

Section 717 of the 1972 Act, Public Law 92-261, 86 Stat. 103 (March 24, 1972) which brings Federal Employees under the Act, should also be read in pari materia with the other sections of the 1972 Act and with the complete Act of 1964. Statutes in pari materia are to be construed together and not in conflict with each other.

When a conflict such as in this case, is present, the most recent law or Act should apply and the conflicting Preferences passed some 39 years earlier should be impliedly repealed.

The Court should note that certain exceptions are contained in the Act but none of these exceptions apply to the Indians or the Bureau of Indian Affairs. (See 1972 U.S. Code Cong. and Ad News pp. 2137 and 2157).

It was noted by the Lower Court that nothing was present in the Committees Report or in House Report No. 92-238 accompanying H.R. 1746 enacted into law as Public Law 92-261 which indicated that the Bureau of Indian Affairs be exempted or excepted from its provisions. Had Congress intended to make an exception for Indian Preference, all that had to be done by it is to place such exception in the Act. Such exception is conspicuously absent.

Finally, to hold that the 1934 Preference Statute for Indians can stand in the face of the 1972 Equal

Employment Opportunity Act would create, in Appellees view, the most flagrant case of discrimination that has ever existed or will ever exist in this Country. The Equal Employment Opportunity Act of 1972 should be held to have repealed, by implication, the Indian Preference Statute.

II.

THE "INDIAN PREFERENCE STATUTES", BEING TITLE 25 USC SEC. 44, 46 and 472, ARE UNCONSTITUTIONAL AS VIOLATIVE OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

Appellees herein, a woman, a Jewish man, a Mexican American, and a Black American, are all non-Indian employees of the Bureau of Indian Affairs, (R.22, 23 142). None of them are employed on or near an Indian Reservation. They perform technical and ministerial tasks and no claim has ever been made that they make decisions for Indians involving Indian matters or participate in any manner in the government of Indian tribes.

Appellees contend that the Indian Preference Acts discriminate against them on a racial basis in promotion to positions likewise not located on or near an Indian Reservation. They have been and are denied jobs and promotions in the same catagories and involving similar tasks that they are qualified to perform.

Appellees contend that the Indian Preference Acts are unconstitutional for the following reasons:

First: As to them, the Bureau of Indian Affairs has not constitutionally applied the Indian Preference Acts as written.

The term "Indian" as used in *25 U.S.C., Section 472*, is defined in *25 U.S.C. Sec. 479*. It defines "Indian" as follows:

> The term "Indian" as used in Sections 471-473, 474, 475, 476-478 and 479 of this title shall include all persons of Indian descent who are members of any recognized Indian Tribe now under Federal jurisdiction, and all persons who are descendants of such members, who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include *all other persons of one-half or more Indian Blood.* (Emphasis ours.)

The Bureau of Indian Affairs has admittedly applied a one-quarter Indian blood criterion in applying these Preference Acts.[7] This is in obvious contradiction to the Act itself.

Section 479 clearly indicates that the definition of the term "Indian" intended by Congress in passing Chapter 576 is inconsistent with the new Indian Preference Policy. The Appellants are clearly exceeding the authority granted by Congress in enforcing a preference to those with one-quarter or more of Indian Blood. Appellees also urge that the case of *Simmons v. Eagle Selatsee,* 244 F.Supp. 808 (E.D. Wash. 1965) does not save Appellants' use of the one-quarter or more Indian blood test. The Simmons case was very clear in interpreting the Congressional Act of August 9 1946, *60 Stat. 968 (25 U.S.C. Section 607) Section 7.* The Simmons case in no way referred to Section 479 which contains the controlling definition of the term "Indian" for purposes of the new Indian Preference Policy.

In attempting to find authority for their new Indian Preference Policy the Appellants are therefore quite clearly taking one section of *Chapter 576, Public Law*

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[7] 44 Indian Affairs Manual, 302.1

383 out of context and at the same time ignoring other sections which specifically contradict other elements of that policy.

Another section relied on by the Appellants for Indian Preference is *Section 44, Title 25 U.S.C.* To place this particular section in its proper perspective, plaintiffs urge the Court to view this provision in its original context. The provision appears at *28 Stat. 313* and is merely one section of Chapter 290 which was approved by Congress on August 15, 1894. Chapter 290, in total, is found in *28 Stat. 286 to 338.* This provision which merely states that Indians shall be employed in the Indian Service is hardly authority for the effort now being taken by the Appellants.

Specifically, the Appellees draw the Court's attention to *Section 478 of Title 25 U.S.C.*, which provides:

> Sections 461, 462, 463, 464, 465, 466-470, 471-473, 474, 475, 476-478 and 479 of this title shall not apply to any reservations wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application. It shall be the duty of the Secretary of the Interior, within one year after June 18, 1934, to call such an election, which election shall be held by secret ballot upon thirty days' notice. June 18, 1934, c.576, Section 18, 48 Stat. 988.

It was clearly Congress' intent that Section 472 should not apply to any reservation which voted against its application. After the passage of Chapter 576, Public Law 383, such elections were held on numerous reservations with the result that the entire Chapter would not be applied to those reservations. One of these reservations rejecting Chapter 576 was the Navajo Reservation, the largest in the United States. Tribal operations records within the Bureau of Indian Affairs will show that many

other reservations also rejected Chapter 576 in total. In view of these individual rejections by reservations it is most difficult to see how the Bureau of Indian Affairs, as a matter of policy, can enforce its present Indian Preference Policy on a Bureau-wide scale. It would have been inconsistent for Congress to include the provisions of Section 478 and yet have intended the interpretation of Section 472 that the Appellant MORTON has put into effect.

Secondly, Appellees contend that the Indian Preference Act is unconstitutional for the following reasons:

The Fifth Amendment of the United States Constitution provides in part that citizens of the United States shall not "be deprived of life, liberty or property, without due process of law;" The Fifth Amendment does not contain an "equal protection clause" as does the Fourteenth Amendment; however, the Supreme Court has held that discrimination, when brought about by Federal action, may be so unjustifiable as to be violative of due process. *Bolling v. Sharpe*, 347 U.S. 497 (1954). Also see the cases of: *Detroit Bank v. United States*, 317 U.S. 329, *Currin v. Wallace*, 306 U.S. 1, and *Stewart Machine Company v. Davis*, 301 U.S. 548. These latter cases recognized that gross discrimination by the Federal Government can be violative of the due process clause of the Fifth Amendment although, their specific fact situations did not justify such a holding.

The Supreme Court has also held that any classifications based solely upon race must be scrutinized with particular care since they are contrary to our traditions and constitutionally suspect. *Korematsu v. United States*, 323 U.S. 214 and *Hirabayashi v. United States*, 320 U.S. 81. These two cases allowed a federally imposed classification based on race, but the Courts made it clear that such classifications were justified only in view of the

imminent dangers of attack imposed on the United States mainland during World War II.

Another case holding that classifications drawn along racial lines are particularly constitutionally suspect is *United States v. Thoresen*, 428 F.2d 654 (C.A. Cal. 1970). The classification in this case was not along racial lines and the Court found that there was an overriding statutory purpose for the classification.

There should be little doubt that the rights of Appellees in this case to seek promotions on non-discriminatory grounds is a property right, but that their liberties, guaranteed by the Fifth Amendment, are also being impaired by the Appellants actions. See *Bolling v. Sharpe*, *Supra* at 499 and 500.

The Appellees further urge to the Court that the authorities raised and relied on by the Appellants in their Briefs miss the mark of deciding the issue of the constitutionality of the "Indian Preference Statutes".

In arguing for the constitutionality of the "Indian Preference Statutes" the Appellants rely upon *Board of County Commissioner v. Seber*, 318 U.S. 705 (1943). The *Seber* case is not on point with the Constitutional issues raised in this cause for the *Seber* case did not decide the issue of whether the tax exemption statutes were violative of the "due process clause" of the Fifth Amendment. The *Seber* case, contrary to the instant case dealt with the tax exempt status of certain lands which in essence were in a trust status with the United States being the trustee. In the instant case there is involved a clear dispute between the rights of Indians as individuals and non-Indians as individuals. In contrast, the *Seber* case involved a dispute between the property rights of Indians and the sovereign powers of a State to tax lands within the State.

The second case relied on by Appellants is *Simmons v. Eagle Selatsee*, 244 F.Supp. 808 (E.D. Wash. 1965); the

Simmons case likewise misses the mark of being persuasive in the instant case because Simmons merely decided what percentage of Indian blood was proper to determine whether an individual part Indian, could take by inheritance or by will an interest in the restricted trust estate of a Tribe. The *Simmons* case did not give Indians any kind of preferential treatment vis-avis non-Indians. The *Simmons* case would be instructive on the issues in this cause if the class of plaintiffs were a group of Indians of one-eighth Indian blood.

The remaining cases cited by Appellants in support of their positions on the issue constitutionality, *The Cherokee Nation v. Georgia,* 5 Pet. 1, 16 and *United States v. Kagama,* 118 U.S. 375 are cases decided in 1856 and 1886 and stand only for the proposition that Indians have had a different and perhaps unique status and relation to the United States. None of these cases go directly to the point at issue here.

Thirdly, Appellees contend that the Indian Preference Act is unconstitutional in that it applies a criterion for hiring and promotions in a Federal Bureau based upon race. It creates, out of the Federal non-Indian employee in the Bureau of Indian Affairs, a second class citizen.[8] This is true in addition to the fact that non-Indian employees are minority employees in the Bureau of Indian Affairs.[9]

Appellees support efforts to meet the special distinct needs of Indian citizens. However, the objectionable and unconstitutional aspect of Appellants position is that the

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[8]Secretary of the Interior, Rogers C. B. Morton Press Conference at Olympia, Washington, December 2, 1971, where he stated: "And the other thing is that when you have Indian preference–and you do have Indian preference for promotion and employment–the non-Indian in the Bureau becomes a second-class citizen".

[9]R.41

special protections being given to Indians in this case directly involve the deprivation of rights of non-Indian citizens.

The Appellants, here, have not shown in their Briefs or by any evidence during the trial of this cause that having any percentage of Indian blood was in any way related to the various jobs to be done. The Court below pointed this out clearly.[10] In addition it has never been shown that having one-quarter blood of one Indian Tribe was of any assistance in working with members of another Indian Tribe.[11]

Finally, the case of *Griggs v. Duke Power Company*, 401 US 424 (1971) indicates strongly that preferences such as we have here must fall where there is no showing that the racial background of the applicant is not reasonably related to job performance. Chief Justice Burger summarized the correct and proper view of preferences under the Civil Rights Act at page 400 of the Opinion.

"Congress did not intend by Title VII, however, to guarantee a job to every person regardless of

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[10]There was no evidence introduced to show in any way that having seventy-five percent non-Indian blood and twenty-five percent Indian blood was in any way a job-related criterion. Griggs v. Duke Power Co., 401 U.S. 424. There was no evidence whatever presented to show any national-public purpose concerned in the preference policy as compared with the nondiscrimination statutes. There would certainly have to be some showing of these factors before defendants' arguments could be considered to support the preference statutes as an exception.

[11]Secretary Morton Reports on Indian Matters, Menlo Park, California, March 1973, where stated "It is difficult to generalize when describing the characteristics of the Indian Community. There is great variance in point of view and attitude among individuals and wide differences in the styles and approach to life from tribe to tribe".

qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has prescribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate insidiously to discriminate on the basis of racial or other impermissible classification".

The Indian Preference Statutes are unconstitutional as violative of the Fifth Amendment of the Constitution of the United States.

CONCLUSION

For all of the above reasons the Judgment of the Three Judge Panel in the United States District Court for the District of New Mexico should be affirmed.

Respectfully submitted,

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